STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:	**)**	**Docket No. 97-AFC-2**
	)	**Order No. 99-0623-2**
Application for Certification	**)**	**ORDER DENYING PETITION**
for the Sutter Power Plant Project	**)**	**FOR RECONSIDERATION**
	)	
	)	**June 23, 1999**

Introduction and Summary

On April 28, 1999 the Commission issued its final decision granting a certificate for the Sutter Power Plant Project, a 500-megawatt, natural-gas-fueled, combined cycle facility to be located approximately seven miles southwest of Yuba City. (Commission Decision: Application for Certification for the Sutter Power Plant Project (Docket No. 97-AFC-2), adopted April 14, 1999 and docketed April 28, 1999 (Decision).) The Commission had previously exempted the Project from the Notice of Intention (NOI) part of the Commission's powerplant siting process. (Commission Order Adopting Committee Proposed Decision, Docket No. 97-SIT-2, June 25, 1997 (NOI Exemption Decision).) On May 27, 1999, Mr. Brad Foster, a party to the Sutter Application for Certification (AFC) proceeding, filed and served on all parties a petition for reconsideration of the Decision pursuant to Section 1720 of the Commission's regulations and Section 25530 of the Warren-Alquist Act. (Petition for Reconsideration, dated May 26, 1999 and docketed May 27, 1999 (Petition).) The Petition was docketed before the expiration of the thirty-day filing deadline. (See Pub. Resources Code, § 25530; Cal. Code Regs., § 1720, subd. (a).) Responses to the Petition were filed, and served on all parties, by the Applicant and by the Commission Staff. We held a hearing on the Petition on June 23, 1999; notice of the hearing was docketed and served on June 1, 1999.

The Petition states:

> The specific ground for this Petition is that the CEC is committing legal error by exempting Sutter from its NOI process without complying with the requirement under CEQA [the California Environmental Quality Act] to produce an environmental impact report (EIR).

(Petition, p. 2, lines 10-13.) It is unclear from this statement whether the Petition is seeking reconsideration of the decision that exempted Sutter from the NOI, or reconsideration of the decision granting a certificate to Sutter. In this Order we address

all matters that could conceivably be viewed as encompassed by the Petition: (1) whether the amendment of the NOI exemption provisions of Public Resources Code section 25540.6 in 1993 necessitated recertification under CEQA of the Commission's powerplant siting program, or, in the absence of recertification, required the Commission to prepare an EIR for the Sutter Project; (2) whether the NOI exemption for the Sutter Project required a CEQA analysis; and (3) whether the alternatives analysis in the Sutter AFC was inadequate under CEQA. As we discuss below, the substantive issues raised by the Petition are without merit. Moreover, the Petition is improper because the issues it raises were not raised during the course of the AFC proceeding before our final Decision. Therefore, we deny the Petition.

I. Substantive Issues.

A. Recertification of the Certified Regulatory Program After the 1993 Statutory Amendment.

CEQA generally requires all state agencies to prepare environmental impact reports (EIRs) on projects they propose to carry out or approve that may cause a significant adverse environmental effect. (Pub. Resources Code, § 21100, subd. (a).) However, CEQA also provides that a state agency permitting program may become exempt from the EIR requirement if the Resources Agency Secretary certifies that the program meets the basic requirements for CEQA documentation, including written analyses of environmental impacts, mitigation, and alternatives. (Pub. Resources Code, § 21080.5.) Certified regulatory programs remain subject to CEQA's substantive requirements, including the necessity to mitigate adverse impacts where feasible and not to approve projects with unmitigable adverse impacts unless the project has overriding benefits. (Cal. Code Regs., tit. 14, § 15250.) The Resources Secretary has certified the Commission's power facility certification program. (***Id.***, § 15251, subd. (k).)

When the Commission's siting program was certified in 1981, most powerplants were subject to a two-phase certification process: the first phase, the Notice of Intention (NOI), involves a preliminary assessment of at least three potential sites, and the second phase, the Application for Certification (AFC), involves a detailed examination of a site previously approved in an NOI. (See generally Pub. Resources Code, §§ 25502, 25519.) At that time Section 25540.6 of the Warren-Alquist Act, which was enacted in 1978 (Stats. 1978, ch. 1010, § 4, p. 3103), exempted several types of facilities from the NOI requirement. In 1993 an amendment added to the list of exempted facilities any "thermal powerplant which is the result of a competitive solicitation or negotiation for new generation resources and will employ natural gas-fired technology . . . ." (Stats. 1993, ch. 1108, § 4, p. 5028.)

Petitioner asserts that the 1993 amendment of the Section 25540.6 required the Commission to obtain recertification of the Commission's certified regulatory siting program and, given that recertification has not occurred, now requires the Commission to prepare EIRs in all of its siting cases, including the Sutter proceeding. We disagree.

CEQA makes it clear that an agency may, but need not, seek recertification if its certified regulatory program changes:

> After a regulatory program has been certified . . . any proposed change in the program which could affect compliance with the qualifications for certification . . . may be submitted to the Secretary of the Resources Agency for review and comment.

(Pub. Resources Code, § 21080.5, subd. (f) (underline added).) By contrast, the Resources Agency Secretary has a duty to decertify if he or she determines that changes to the program make it out of compliance with the certification requirements:

> The Secretary of the Resources Agency shall certify a regulatory program which the Secretary determines meet all the qualifications for certification set forth in this section, and withdraw certification on determination that the regulatory program has been altered so that it no longer meets those qualifications.

(***Id.***, § 21080.5, subd. (e)(1) (underline added).) The plain meaning of the statutory provisions is that once a program has been certified, it remains valid and in force until the Resources Secretary takes affirmative action to withdraw certification. Even if the program is changed, an agency need not take any action to maintain certification, absent action by the Secretary. In the case of the Commission's certified powerplant siting program, the Secretary has not withdrawn certification and therefore the program remains certified and valid.[1] As a result, the Commission's use of the program in the Sutter proceeding was proper, and no EIR was required.

Our conclusion is bolstered by the recent decision in ***Mountain Lion Foundation*** v. ***Fish & Game Commission*** (1997) 16 Cal.4th 105 [65 Cal.Rptr.2d 580]. That case involved a regulatory program certified in 1976. In 1984, the California Endangered Species Act became law, and the plaintiff in the litigation contended that as a result of the statutory enactment the certification had become invalid and the agency was thus required to prepare EIRs to support its determinations – the same contention that the Sutter Petition makes. The Supreme Court clearly rejected that argument:

> To the contrary, it appears the Legislature intended a state agency's certified regulatory program to remain in force notwithstanding subsequent additions and amendments to the program, unless and until the Secretary withdraws the certification.

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[1] Public Resources Code Section 25541.5 requires the Commission to seek certification for its siting program, and, "[a]fter certification by the Secretary . . . [to] amend such regulatory program from time to time to permit the Secretary to continue to certify the program." The provision appears designed to ensure that the Commission will make changes ***if*** the Secretary finds that any are necessary, so that the Commission will continue to use a certified regulatory program rather return to the preparation of EIRs.

> Section 21080.5, subdivisions (e) and (f), govern the possible effect of subsequent changes in a state agency's regulatory program . . . . [para.] In enacting these provisions, the Legislature appears to have contemplated that once certification occurs, alterations in the regulatory program through statutory amendment or regulatory change will not affect the program's continued validity unless and until the Secretary withdraws certification. If the Secretary has not made the determination that changes in the regulatory program affect the qualifications for certification, a state agency acting pursuant to later-enacted amendments to its regulatory program may continue to generate an environmental document in accordance with its own procedures in lieu of preparing and certifying an EIR.

(16 Cal.App.4th at pp. 128 – 129 [65 Cal.Rptr.2d at pp. 594 – 595].) The Sutter Petition asserts that ***Mountain Lion*** stands for the proposition that changes to a certified regulatory program render the program invalid unless the program is recertified, but the Supreme Court's clear language to the contrary indicates that the assertion is incorrect.

We also note that changes to the NOI process do not affect the status of the AFC within the certified regulatory program. When the Commission's siting program was certified, the Resources Secretary found that the AFC process independently satisfied CEQA, even in the absence of an NOI. (See Resources Agency, Statement of Reasons, March 11, 1981 (appended to the Commission Staff's Response to Petition for Reconsideration, Docket 97-AFC-2, June 16, 1999).) Indeed, the Secretary would have had to so find, because Section 25540.6, which was originally enacted in 1978 (Stats. 1978, p. 3103, § 4), already exempted several kinds of powerplants from the NOI. Therefore, the AFC process must have separately met the requirements for a certified regulatory program in 1981, and it continues to do so today.

Finally, even if Petitioner were correct that the 1993 amendment to Section 25540.6 required recertification, or in the alternative now requires preparation of EIRs for AFCs, the appropriate remedy in this proceeding would be the preparation of an EIR for the Sutter AFC. However, as we discuss in part II.C. of this Order, at pages 5 – 7 below, the consideration of environmental effects, mitigation, and alternatives in the Sutter proceeding fully complied with all the requirements for an EIR as well as for a certified regulatory program. Ultimately, then, what Petitioner is asking us to do is to reissue the environmental documentation with a new cover. Such an elevation of form over substance is not necessary.

B. The Application of CEQA to the 1997 NOI Exemption.

CEQA applies only to an agency's "approval" of a "project." (Cal. Code Regs., tit. 14, §§ 15002, subd. (i), 15352 & Discussion thereof; ***Lexington Hills Association*** v. ***State*** (1988) 200 Cal.App.3d 415, 433 [246 Cal.Rptr. 97, 106].) A "project" is an activity (1) directly undertaken by a public agency, (2) supported through contracts, grants, loans, or other assistance from a public agency, or (3) involving the issuance by an agency of a permit or other entitlement for use. (Cal. Code Regs., tit. 14, § 15378, subd. (a).) An "approval" is a decision that commits an agency to a definite course of action (***id.*** § 15352, subd. (a)); a preliminary decision that does not commit an agency to a definite course of action is not subject to CEQA. (***Stand Tall on Principles*** v. ***Shasta Union High School District*** (1991) 235 Cal.App.3d 772, 781 [1 Cal.Rptr.2d 107, 111].)

The Sutter NOI exemption was not a "project" subject to CEQA because the powerplant is not undertaken by an agency or supported by agency funds, and because the NOI exemption was not an entitlement for use. The NOI exemption was not in the nature of a permit; rather, it was merely a determination of which of two siting permitting processes was appropriate. Nor was the exemption an "approval"; it did not commit the Commission to any course of action, because the Commission's certificate still had to be obtained in the AFC proceeding, which would be subject to full CEQA review. (See ***Kaufman & Broad – South Bay*** v. ***Morgan Hill Unified School District*** (1992) 9 Cal.App.4th 464, 472 [11 Cal.Rptr.2d 792, 797].) Therefore, the Sutter NOI exemption decision was not subject to CEQA.

C. The Validity of the CEQA Analysis in the Sutter AFC Proceeding.

Petitioner suggests that the alternatives analysis in the Sutter AFC proceeding was inadequate because it did not rise to the level of the analysis that would have been conducted had the Commission prepared an EIR. We disagree, for two reasons.

First, we reject the general proposition that an alternatives analysis in an EIR is somehow automatically better than an alternatives analysis prepared under a certified regulatory program. That is because there does not appear to be a substantial difference between what is legally required by the CEQA Guidelines for the two analyses. The Guidelines on certified regulatory programs state:

> The document used as a substitute for an EIR . . . shall include . . . [a]lternatives to the activity . . . to avoid or reduce any significant or potentially significant effects that the project might have on the environment.

(Cal. Code Regs., tit. 20, § 15252.) The Guidelines on EIRs state:

> An EIR shall describe a range of reasonable alternatives to the project . . . which would feasibly obtain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.

(***Id.***, § 15126.6.) Apart from the evaluation of comparative merits, there is no meaningful difference between the two requirements.

Second, the particular alternatives analysis conducted in the Sutter AFC proceeding complies fully with the requirements for an EIR. The Sutter environmental documentation assesses four alternative sites (from a preliminary list of eleven sites screened for feasibility), analyzes the "no project" alternative and two alternative transmission line routes, and considers alternative technologies, fuels, and pipeline routes. (See Decision, pp. 246 – 257.)[2] The Decision evaluates the comparative merits of the alternatives and concludes that none of the feasible alternatives would be environmentally preferable to the proposed project. (***Id.***, pp. 253, 255 – 256.) (The Decision also concludes that the project as proposed will not have any significant adverse effects, which under CEQA made an alternatives analysis unnecessary to begin with. (***Id.***, pp. 247, 257.) [3]

The Petition does not point to a single alternative site, technology or fuel that should have been considered in the proceeding but was not. Nor does the Petition describe any flaws in the description or assessment of the alternatives that were considered. In particular, Petitioner does not assert that an alternatives analysis that would have been produced in an NOI proceeding on Sutter would have been more extensive, thorough, detailed, or correct than the analysis that was actually performed in the AFC proceeding. And Petitioner does not challenge the Decision's determination that the certified site and facility would have fewer adverse impacts than any of the alternatives considered. In the absence of any specific identification of a defect in the environmental analyses, we are left with no choice but to ratify our previous decision.

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[2] Although the extensive alternatives analysis performed in the Sutter proceeding was certainly sufficient to satisfy CEQA, we do not assume, or mean to imply, that such an analysis would be necessary in any other case. The appropriate breadth and detail of an alternatives analysis must be determined on a case-by-case basis: "There is no ironclad rule governing the nature or scope of alternatives to be discussed other than the rule of reason. [Citations.]" (Cal. Code Regs., tit. 14, § 15126.6, subd. (a); see also ***id.***, § 15126.6, subd. (f).)

[3] The Commission Staff prepared an environmental analysis jointly with the Western Area Power Administration (WAPA), which has federal jurisdiction over the Sutter Project. All elements of federal and state environmental requirements were addressed in the Final Staff Assessment/Draft Environmental Impact Statement. (Decision, p. 2.) The Commission adopted the Sutter Revised Presiding Member's Proposed Decision (Revised PMPD), which incorporates the Staff and WAPA analysis, as the CEQA environmental documentation for the project. (See Commission Adoption Order, Docket No. 97-AFC-2, April 14, 1999, p. 1; Decision, pp. 10, 25 – 26, 30 – 31.)

The Sutter Decision acknowledges that it is generally not possible to subject alternatives to the same level of scrutiny as a proposed project. (Decision, p. 256; see also Revised PMPD, p. 256.) Petitioner seems to believe that the Commission has thereby confessed that the alternatives analysis in the Sutter proceeding was deficient. (See Petition, p. 7, lines 15 – 18.) But the Commission's statement merely echoes the CEQA Guidelines, which acknowledge that the significant effects of alternatives "shall be discussed, but in less detail than the significant effects of the project as proposed." (Cal. Code Regs., tit. 14, § 15126, subd. (d).)

I. **The Timeliness of the Petition.**

Neither Petitioner nor any other party raised an issue concerning the validity of the Commission's certified regulatory program, or the alternatives analysis conducted thereunder, during the course of the Sutter AFC proceeding. Petitioner has not asserted that those issues could not have been raised during the proceeding. We believe, therefore, that the Petition is improper and should be denied.

Although no legal provision squarely addresses the matter, we believe that petitions for reconsideration may raise only matters that have previously been raised on the record during the course of a proceeding before the decision or order at issue is made, unless it would have been impossible in the exercise of due diligence to do so. (For example, if new relevant evidence is discovered after a decision is adopted, and the evidence was not and could not reasonably have been discovered during the proceeding, it might be proper to raise the matter for the first time on reconsideration.) Allowing new matters to be raised for the first time on reconsideration would be inconsistent with the judicial rule of exhaustion of remedies, which is designed to prevent unfairness to parties, unnecessary delay, and inefficiency.

The exhaustion doctrine forbids a litigant from raising a matter in judicial litigation against an agency unless the matter was previously raised in the agency proceeding. (See, e.g., ***Bockover*** v. ***Perko*** (1994) 28 Cal.App.4th 479, 486 [34 Cal.Rptr.2d 423, 427].) Applying the rule in administrative proceedings ensures that all parties have a fair opportunity to rebut opposing evidence. It also brings certainty to proceedings: if parties could raise new issues on reconsideration, proceedings could go on endlessly.

Moreover, with regard to CEQA litigation, the exhaustion doctrine is enshrined in statute: no litigation alleging CEQA noncompliance may be brought unless the alleged grounds of noncompliance were presented to the agency during the public comment period or at the agency's final hearing. (Pub. Resources Code § 21177, subd. (a).) Petitioner will therefore be proscribed from raising his arguments in a judicial challenge, and we see no reason why he should be allowed to raise them for the first time on reconsideration in our proceeding, when the issues could have been raised before.

To the extent that the Petition challenges the Commission's decision that exempted the Sutter Project from the NOI, the Petition is also untimely. That decision

was adopted on June 25, 1997. (NOI Exemption Decision.) Moreover, it is unclear whether NOI exemption decisions are subject to reconsideration at all, because reconsideration is available only where a statute expressly provides for it (***Olive Proration Program Committee*** v. ***Agricultural Prorate Commission*** (1941) 17 Cal.2d 204 [109 P.2d 918, 921]), and Section 25530 of the Warren-Alquist Act may apply only to decisions or orders made during proceedings for approval of NOIs and AFCs – not to proceedings exempting projects from the NOI. For purposes of this Order we will assume without deciding that the NOI Exemption Decision was subject to reconsideration, but the 30-day period for reconsideration has long since passed.

Conclusion

For all of the reasons discussed above, the Petition is denied.

June 23, 1999

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

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